INDEX

BLURRED COPY

Argument—Continued

CITATIONS

Cases:

BLEED THROUGH– POOR COPY

Cases—Continued

BLURRED COPY

Statutes:

Miscellaneous:

BLEED THROUGH– POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 301

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION NO. 41, A. F. L.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. 90-95) is reported at 196 F. 2d 1. The findings of fact, conclusions of law, and order of the Board (R. 13-30) are reported at 94 NLRB 1494.

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JURISDICTION

The judgment of the court below was entered on April 29, 1952 (R. 95). The Board's petition for rehearing was denied on June 2, 1952 (R. 99). The petition for a writ of certiorari, filed on August 28, 1952, was granted on October 20, 1952 (R. 101). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether denial of employment to a union member, because he has failed or refused to perform an obligation of union membership, constitutes discrimination which encourages or discourages "membership" in a labor organization within the meaning of Section 8 (a) (3) of the Act, regardless of the lack of proof that the denial of employment "encouraged" (or "discouraged") the employee immediately affected, or any other employee, to acquire or retain "membership" in the Union. Otherwise stated, the question is whether it is an unfair labor practice, within the meaning of Section 8 (b) (2) and (1) (A) of the National Labor Relations Act, for a labor organization to cause the reduction of an employee's seniority standing because of the employee's delinquency in the payment of dues to the labor organization where no valid union security agreement is in effect.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136 and 65

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Stat. 601, 29 U.S.C. Supp. V, 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 46-51.

STATEMENT

Upon the basis of a charge filed by Frank Boston (R. 2-3), an employee of the Byers Transportation Company, a complaint was issued alleging that, in violation of Section 8 (b) (2) and (1) (A) of the Act, the respondent Union had caused the Company to discriminate against Boston by reducing his seniority standing because of Boston's delinquency in paying his dues to the Union (R. 4-6). The findings of fact pertinent to this complaint, which are undisputed, may be summarized as follows:

I. The Board's Findings of Fact

The Union, as the exclusive bargaining representative of the teamsters in the Company's employ, and the Company were parties to a collective bargaining agreement, known as the "Central States Area Over-the-Road Agreement."[1] This agreement governed working conditions on all over-the-road operations of the Company. It contained a clause making union membership in good standing a condition of employment, but this clause was to become effective only after the Union received the statutory authorization necessary to validate such a provision (R. 14, 15, n. 4, 24; 5, 35, 36, 38-39). Since the Union did not obtain such authorization (R. 14, 24; 5, 35, 87-88), this clause never became

[1] This agreement has been executed with employers by more than 300 locals of the Union in 12 different states (R. 75).

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operative. The agreement further provided that where "this clause may not be validly applied, the employer agrees to recommend to all employees that they become members and maintain such membership during the life of this Agreement, to refer new employees to the union representative, and to recommend to delinquent members that they pay their dues since they are receiving the benefits of the contract" (R. 15, n. 4; 39).

The agreement established a seniority system which governed the order of truck-driving assignments and lay-offs (R. 24; 41, 47, 53, 57). Employees received priority in assignment to available work over those below them on the seniority list, were not subject to lay-off until those beneath them were separated, and were accorded priority according to seniority in bidding for better jobs (*ibid.*). New employees hired by the Company, after a 30-day trial period, were placed at the foot of the list, and could improve their standing only as senior employees were either removed from the list or reduced in their position on it (R. 39, 41, 47, 51-53, 86-87).[2]

The agreement provided that "Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement" (R. 24; 41, 51-52, 74-76, 29). The Union

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[2] The agreement provided that "Seniority shall be broken only by discharge, voluntary quit, or more than a two-year lay-off" (R. 41). As construed, to have seniority "broken" meant that the employee was removed from the seniority list altogether; it did not embrace altering an employee's position on the list (R. 48).

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had "sole control over the employees' seniority", and the Company operated "according to the published seniority list" furnished by the Union (R. 51). From time to time, after receiving from the Company the initial dates of employment of newly-hired teamsters, the Union would compile a seniority list and transmit it to the Company for posting (R. 36, 46, 52).

Section 45 of the Union's by-laws, as it related to seniority, provided that "Any member, under contract, one month in arrears for dues shall forfeit all seniority rights * * * [o]n the second day of the second month a member becomes in arrears in dues" (R. 24; 65). According to the uniform interpretation of this clause, union dues were payable on the first day of each month, and a member became "in arrears for dues" on the second day of the following month (R. 24; 55-56). Thus a member who failed to pay June dues until after July 1, was "in arrears" (*ibid.*).

Section 42 of the Union's by-laws provided that "To be in continuous good standing, a member must pay his dues on or before the first of the month, in advance" (R. 65).[3] Section 44 of the Union's by-laws provided that any member "Three (3) months in arrears for dues shall stand suspended," but it stated also that the Union retained "jurisdiction over any member * * * until such time as he is

[3] In addition, the Union's by-laws (Sec. 5, Advice to Stewards) instructed the Union's stewards that if a member "in arrears" in dues applied for employment, and another member "in good standing [could] be had," the steward was to "object" to the delinquent member's "going to work" (R. 70).

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released, either by Withdrawal Card, Transfer Card, expulsion or death" (*ibid.*).

The Union's position under the collective bargaining agreement as the sole arbiter of controversies over seniority standing was construed to include the authority to reduce a member's seniority because of dues delinquency as provided in the Union's by-law (R. 50, 74). With the knowledge and assent of the Company, it was the Union's practice to enforce the payment of dues on time through this by-law, and to this end the Union reduced the seniority of union members delinquent in their payment of dues (R. 24; 74-75, 49, 50-52, 46-47, 48, 77-86 (omitting intervening exhibit)).

For over four years, Frank Boston was employed as a truck driver by the Company (R. 24; 54). During the entire period, he was a member of the Union and, by the end of June 1950, had reached the 18th position on the seniority list (R. 24; 54-55). However, Boston did not pay his June union dues until July 5, 1950, when he paid his dues for both June and July (R. 24; 55-56). On July 15, the Union compiled a new seniority list, and reduced Boston's standing from 18th to 54th, the bottom position on the list (R. 24; 55-56, 53, 46). The Union submitted the new list to the Company and the Company posted it (R. 24; 46). As a consequence of his reduced seniority, Boston was deprived of truck-driving assignments which he would otherwise have obtained and for which he would have received compensation (R. 24; 57, 53).

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After Boston's seniority had been reduced, he filed an unfair labor practice charge, his purpose being "to try to get rid of this rule" providing for loss of seniority because of dues delinquency, whose original adoption he had opposed, and thereby "to help * * * make a better union out of it" (R. 72).

II. The Board's Conclusions and Order

The Board found that the Union had violated Section 8 (b) (2) of the Act by causing a reduction in Boston's seniority because of his delinquency in the payment of his dues (R. 14-15, 25-27). The Board held that, "absent a valid contractual union security provision, Boston had the absolute protected right under the Act to determine how he would handle his union affairs without risking any impairment of his employment rights and that the Union had no right at any time whether Boston was a member or not a member to make his employment status to any degree conditional upon the payment of dues * * *" (R. 14). The Board observed that the discrimination against Boston had the "effect of enforcing rules prescribed by the Union, thereby strengthening the Union in its control over its members and its dealings with their employers and was thus calculated to encourage all members to retain their membership and good standing either through fear of the consequences of losing membership or seniority privileges or through hope of advantage in staying in" (R. 27). The Board also held that, in violation of Section 8 (b) (1) (A) of the Act, the Union's reduction of

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Boston's seniority restrained and coerced him in the exercise of his right to refrain from assisting a labor organization (R. 26, 15).

The Board entered an order requiring the Union to cease and desist from the unfair labor practices found and from related conduct; to notify Boston and the Company that the Union withdraws its request for the reduction of Boston's seniority and that it requests the Company to offer to restore Boston to his former status; to make Boston whole for any losses of pay resulting from the discrimination; and to post appropriate notices of compliance (R. 16-17).

III. The Court's Decision

The Board's petition to enforce its order was denied by the court below (R. 31-33, 90-95). The court agreed that the Union had "caused or attempted to cause the employer to discriminate against Boston," but, holding that "Discrimination alone is not sufficient," it stated that the question was whether "there is substantial evidence to support the finding that such discrimination would or did 'encourage or discourage membership in any labor organization' * * *" (R. 93-94). Noting that Boston was a member of the Union from the inception of his employment with the Company and is still a member (R. 94), the court below concluded that the reduction in his seniority "neither encouraged nor discouraged his adhesion to membership" in the Union (R. 95). The court stated further that, assuming the effect on other employees of the discrimination against Boston was relevant,

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there was no evidence to support a conclusion that the membership of other employees in the Union was affected (R. 95). The court concluded that the Union had not violated Section 8 (b) (2) of the Act; it did not advert to the Board's company holding that the Union's conduct violated Section 8 (b) (1) (A) of the Act.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that discrimination against a union member because he failed to perform an obligation imposed by the union upon its members to regulate its internal affairs does not, without more, constitute "discrimination * * * to encourage or discourage membership in any labor organization" within the proscription of Section 8 (a) (3) of the Act.

2. In failing to issue a decree enforcing the order of the Board.

SUMMARY OF ARGUMENT

The essence of the statutory scheme is to divest both employers and unions of any control over employment when utilized to advance or retard an employee's exercise of the right to participate in or to forego union activity. The single limitation placed on an employee's freedom in this respect is that pursuant to a valid union security agreement the employee may be compelled to pay union dues and initiation fees. By no other means, and for no other purpose, may a union exercise discriminatory control over employment based on an

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employee's failure to adhere to membership standards.

Despite its manifest incompatibility with the statutory scheme, the conclusion of the court below is that a union may cause a reduction in an employee's seniority for delinquency in dues payment without the sanction of a valid union security agreement. That result is reached by reasoning that Section 8 (a) (3) of the Act prohibits discrimination only if it encourages or discourages "membership" in any labor organization and that the evidence in this case fails to establish that any employee was induced to join or withdraw from the union as a result of the discrimination practiced.

The court's basic error lies in its misconception of the meaning of "membership." That term embraces membership in good standing in addition to enrollment in the union. This was its settled meaning under the Wagner Act, confirmed by contractual practice, trade union usage, and common understanding. An employee who is delinquent in the payment of his dues defaults in the performance of a membership obligation and thereby fails to maintain his membership in good standing. Hence, to reduce an employee's seniority for dues delinquency palpably encourages his membership in good standing.

Under the Wagner Act, discrimination in employment to compel the payment of dues—and thereby to encourage membership in good standing—could only be effected through the sanction

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of a valid union security agreement. Plainly the amendments to the Act, with their far greater restrictions on a union's discriminatory control over employment, contemplated no less.

In any event, even if membership means only enrollment in a union, compulsory dues payment tangibly encourages the acquisition and retention of membership by employees. Guaranteed revenue makes for greater organizational strength, itself an attraction to membership; and a union's capacity to impair employment in order to compel dues payment evidences its power as an organization in which membership is to be embraced in order that its opposition be avoided.

Under either view of the meaning of membership—whether it is restricted to enrollment or extends to good standing status as well—any discrimination is outlawed which *tends* to encourage or discourage membership. The tendency may reasonably be inferred from the character of the discrimination without other evidence of its existence. And so long as the tendency exists, it is immaterial whether its reasonably anticipated effect actually materializes. In this case the reduction in seniority for dues delinquency meets these standards; the Union's conduct, therefore, violates Section 8 (b) (2) of the Act.

The Union's conduct also violates Section 8 (b) (1) (A) of the Act. For the discrimination practiced is restraint and coercion of an employee in the exercise of his right to refrain from assisting a labor organization.

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ARGUMENT

A Union, by Causing Reduction of an Employee's Seniority for Delinquency in Dues Payment, in the Absence of a Valid Union Security Agreement, Violates Section 8(b)(2) and (1)(A) of the Act

The court of appeals has held that, even in the absence of a valid union security agreement, a labor organization may cause a reduction in an employee's seniority for delinquency in the payment of union dues unless there is a showing that the consequence of the discrimination is to encourage or discourage his or any other employee's "adhesion to membership" in the union. We shall show (1) that this conclusion is precluded by the Act's guarantee that no employee may be compelled to pay union dues except in conformity with a valid union security agreement; (2) that the interpretation of the Act which underlies the court's conclusion invites the same abuses of union power over employment which induced Congress to limit the enforcement of a union security agreement to compelling only the payment of union dues; (3) that the court misconceives "membership" to mean only enrollment in a union, and fails to discern that it extends to "membership in good standing," a status which a member maintains by the performance of union obligations, of which timely payment of dues is an indispensable part; (4) that reduction in an employee's seniority for delinquency in paying dues obviously encourages his membership in good standing; (5) that even if membership means only enrollment in a union, the court fails adequately to evaluate the influence on

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enlisting and maintaining membership which is exerted by compelling prompt payment of dues; and (6) that under either meaning of membership, the discrimination need only *tend* to encourage or discourage membership, and it is immaterial whether the effect has actually manifested itself.

A. THE STATUTORY SCHEME DIVESTS BOTH EMPLOYERS AND UNIONS OF CONTROL OVER EMPLOYMENT DIRECTED TO ADVANCING OR RETARDING AN EMPLOYEE'S PARTICIPATION OR NON-PARTICIPATION IN UNION ACTIVITY EXCEPT TO PERMIT COMPULSORY DUES PAYMENT PURSUANT TO A VALID UNION SECURITY AGREEMENT

The result of the statutory scheme created by the amended National Labor Relations Act, insofar as it is now material, is to divest both employers and unions of any control over employment utilized to advance or retard an employee's exercise of the right to participate in or to forego union activity. The single limitation placed on an employee's freedom is that, pursuant to a valid union security agreement (which admittedly was not present in this case), he may be compelled to pay union dues and initiation fees.

Section 7 of the Act is the cornerstone of the statutory scheme. It states that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

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or protection * * *." In addition to specifying the right to participate in union activity, Section 7 adds that employees:

> shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

To safeguard the exercise of these rights against infringement by employers, Section 8 (a) (1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." More specifically, Section 8 (a) (3) of the Act prohibits an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The proviso added to this Section illuminates the scope of the prohibition as well as the extent of the exception to it. The proviso permits an employer to make "an agreement with a labor organization" requiring "as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." The making of the agreement is hedged with the requirements (1) that the labor organization be free of employer control or assistance, (2) that it represent a majority of the employees within the

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appropriate unit, and (3) that the labor organization shall have obtained statutory authorization to negotiate the agreement.[4] Even where, unlike this case, these requirements are met, performance of the agreement is circumscribed by provisos (A) and (B) of Section 8 (a) (3) which provide:

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The statutory requirement is thus explicit that no reason other than failure to tender periodic dues and initiation fees shall warrant discrimination against an employee pursuant to a union security agreement.

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[4] Before October 22, 1951, at the time this case arose, statutory authorization comprised certification by the Board that a majority of the employees eligible to vote had voted to empower the labor organization to negotiate such an agreement. By amendment on October 22, 1951 (65 Stat. 601, 29 U. S. C., Supp. V, Sec. 158(3)), this requirement was repealed, and in its place Congress substituted an express condition, formerly subsumed in the election requirement, that the labor organization shall have secured from the Board a "notice of compliance" with the filing requirements of Section 9(f), (g), and (h) of the Act.

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To protect employees from the abridgment of their rights by labor organizations, Section 8 (b) (1) (A) of the Act makes it an unfair labor practice for a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7," ~~wit hthe~~ with the proviso that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Section 8 (b) (2) of the Act further forbids a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a) (3) * * *."[5] In consequence, the discrimination which a labor organization may not cause or attempt is the same as that which an employer may not effect.

B. CONGRESS SOUGHT TO ELIMINATE UNION ABUSES OF CONTROL OVER EMPLOYMENT IN THE FIELD OF UNION ACTIVITY BY PERMITTING THE EXERCISE OF CONTROL ONLY THROUGH A VALID UNION SECURITY AGREEMENT AND ONLY FOR THE PURPOSE OF COMPELLING DUES PAYMENT

The reach of the pertinent statutory provisions can best be understood in relationship to the abuse they were designed to curb. For present purposes,

[5] Section 8(b)(2) continues: "* * * or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

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that abuse in the view of Congress arose from the control over employment which a union exerted discriminatorily through a closed shop agreement. Therefore, in order to ascertain the divestment of a union's control over employment which the present statutory scheme works, it is appropriate to inquire into the system which prevailed under the Wagner Act, the evil Congress perceived in it, and the steps which it took to correct it. This will show that the only means by which a union may compel the payment of dues is through a valid union security agreement, and that there is no other way in which a union may exercise discriminatory control over employment based on an employee's failure to adhere to membership standards.

Under the Wagner Act, the maximum control over employment which a union could lawfully exert by discrimination was through the closed shop agreement. The social advantages attributed to the closed shop agreement by its proponents may be described as (1) sharing the cost, (2) security, and (3) responsibility. In terms of sharing the cost, it requires all those who obtain the benefits of union standards to share the financial burdens incurred in their acquisition and maintenance; in terms of security, by requiring all employees to be union members, it prevents attrition of the union's membership, thereby maintaining and enhancing its bargaining power through the strength which comes from unity; in terms of responsibility, by subjecting all the employees to common union discipline, it enables the union to

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enjoin adherence to its rules and to the obligations of the collective bargaining agreement.[6]

These advantages are obtained under closed shop agreements by vesting the union with the power to cause impairment of a worker's tenure of employment if the worker fails to acquire or retain union membership in good standing in accordance with standards prescribed by the union. Thus the union's control over employment is at the root of a closed shop agreement. "It puts the employment office under a veto of the union, which uses its own membership standards as a basis on which to exclude men from employment."[7] Before its amendment in 1947, so far as federal law was concerned, the Wagner Act permitted untrammelled enforcement of such agreements. *Colgate-Palmolive-Peet Co.* v. *National Labor Relations Board,* 338 U. S. 355, 361.

In 1947, however, Congress determined that the advantages which flow from a union's control over employment are overbalanced by the abuses engendered. The House Report stated (H. Rep. No. 245, 80th Cong., 1st Sess., 34):

> The system enslaves workers to the union, creates a tight monopoly that deprives deserv-

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[6] This generalized statement is derived from: *The Closed Shop and Union Security,* Economic Brief of the American Federation of Labor, submitted in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.,* 335 U. S. 525, and from the materials collected in Appendix B, pp. 86-116, of the Board's brief in *Wallace Corporation* v. *National Labor Relations Board,* 323 U. S. 248, Nos. 66, 67, October Term, 1944.

[7] Mr. Justice Jackson, dissenting in *Wallace Corporation* v. *National Labor Relations Board,* 323 U. S. 248, 267-268.

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> ing men of the right to work and that is the cornerstone of practices of unions, acting alone or jointly with employers, that raise prices, impair output, and restrain trade.

The Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 6, 7):

> We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged
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> * * * * *
>
> If trade-unions were purely fraternal or social organizations, such instances would not be a matter of congressional concern, but since membership in such organizations in many trades or callings is essential to earning a living, Congress cannot ignore the existence of such power.

Among the instances of abuse noted were: preventing an employee from campaigning to displace the incumbent union with another union more to the employee's liking;[8] causing the discharge of a union member because he testified against a union shop steward,[9] or refused to contribute to a political fund,[10] or attempted to run for office against the incumbent president of the interna-

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[8] S. Rep. No. 105, 80th Cong., 1st Sess., 21-22; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44.

[9] S. Rep. No. 105, 80th Cong., 1st Sess., 6-7; 93 Cong. Rec. 3837, 4135, 4193, 4886.

[10] 93 Cong. Rec. 4135, 4432.

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tional union,[11] or refused to buy a ticket for a raffle supported by the union;[12] and causing discharge because of a worker's race.[13]. Epitomizing the antipathy towards union control over employment, Senator Taft referred to "a member of a union who displays an antiunion attitude", and observed that (93 Cong. Rec. 4191):

> It is contended that the employer should be obliged to discharge the man because the union does not like him. That is what we are trying to prevent. I do not see why a union should have such power over a man in that situation.

Congress weighed the abuses of union security agreements against the social advantages attributed to them. In so doing, it was impressed only with the argument that their use was desirable as a means of requiring employees to share the cost. As a result, by proviso (B) to Section 8 (a) (3), Congress permitted the making of a union security agreement but it confined its enforcement to compelling the payment of periodic dues and initiation fees (supra, p. 15). The Senate Report stated:[14]

> * * * abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements. * * *

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[11] *Ibid.*

[12] *Ibid.*

[13] 93 Cong. Rec. 4193.

[14] S. Rep. No. 105, 80th Cong., 1st Sess., 6-7; see also, 93 Cong. Rec. 4135, 4432.

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> In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.
>
> * * * * *
>
> It seems to us that these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements.

In his major speech on the floor of the Senate explaining the amendments, Senator Taft stated (93 Cong. Rec. 3837):

> In other words, what we do, in effect, is to say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues.

Senator Taft later stated in identical tenor (93 Cong. Rec. 4887):

> I may say that the argument made for the union shop, and against abolishing the closed shop, is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself. * * * under the rule of the committee, we

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> pretty well take care of that argument. There is not much argument left.[15]

In Congress, opponents of the measure objected to restricting enforcement of union security agreements to the payment of dues, for, as they conceived it, this sharp restriction negated the major advantages believed to inhere in such agreements.[16] But the policy consideration which prevailed in Congress was to foreclose all discriminatory control over employment by unions with one exception. That exception was made only broad enough to give unions an opportunity to eliminate free riders by compelling dues payments through a union security agreement. Congress permitted a union to adopt and pursue any membership policy it deems wise, and to deny or terminate membership on any ground it chooses, but forbade a union from invoking a union security agreement for the purpose of enforcing any aspect of its membership

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[15] In its report on the operation of the amended Act after it went into effect, the Joint Committee stated that (S. Rep. No. 986, pt. 3, 80th Cong., 2d Sess., 52): "When Congress abolished the closed shop and permitted the union shop with the safeguard that it might not be used to deny employment to anyone whose lack of membership was occasioned by anything other than refusal to pay a reasonable initiation fee and regular membership dues, it was attempting to eliminate the abuses of compulsory membership while still permitting labor organizations to enjoy a form of union security. * * * In permitting a limited form of compulsory membership, Congress recognized that the 'free rider' argument had some validity."

[16] S. Min. Rep. No. 105, 80th Cong., 1st Sess., 9; H. Min. Rep. No. 245, 80th Cong., 1st Sess., 80; 93 Cong. Rec. 4032, 4191-92, 6296.

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policy other than payment of dues.[17] Thus, the House Report stated (H. Rep. No. 245, 80th Cong., 1st Sess., 32):

> * * * if the suspension or expulsion results from anything other than nonpayment of initiation fees and dues * * *, the union may not require an employer to discharge the member under an agreement * * * making union membership a condition of employment. * * * In brief, a union may deny membership to an employee upon any ground it wishes, but the only ground on which it can have him discharged under a "union security" clause is nonpayment of initiation fees and dues; * * * once it has admitted a man to membership it can suspend or expel him for several reasons, but its action cannot cost him his job unless it was for not making the specified payments.

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[17] The House bill had contained restrictions on the power of a union to suspend or expel its members. H. R. 3020, 80th Cong., 1st Sess., April 18, 1947, Sec. 8(c)(6), in 1 Leg. Hist. 158, 181. However, these restrictions were not carried over to the amended Act as finally adopted. Instead, Section 8(b)(1) of the Act, while forbidding restraint and coercion of employees by unions, has an express proviso stating that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The purpose of this proviso is to assure that the internal administration of a union insofar as it pertains to admission or expulsion of members is to be unaffected by the amendments. 93 Cong. Rec. 4271-72. In conference this view prevailed and was embodied in the proviso. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 46. However, while leaving a union free to promulgate any membership program it chooses, Congress divested a union of control over employment to enforce its membership policy. *Union Starch & Refining Co.* v. *National Labor Relations Board*, 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815.

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The Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., 20-20):

> The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. * * *
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> * * * * *
>
> * * * It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except in the two situations described.[18] Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job because of a contract requiring membership as a condition of employment. Discrimination is permitted only if he has failed to tender dues and initiation fees * * *.

The line drawn by the House and Senate Reports is clearly marked as well in a colloquy between Senators Taft, Ball, and Pepper (93 Cong. Rec. 4272; see also 93 Cong. Rec. 4193):

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[18] The Senate bill evidently permitted a union to discriminate against an employee pursuant to a union security agreement for (1) an employee's failure to pay dues and (2) for an employee's campaigning to oust the incumbent union at a period inappropriate for a redetermination of representatives. H.R. 3020, 80th Cong., 1st Sess., May 13, 1947, Secs. 8(a)(3) and (b)(2), in 1 Leg. Hist. 237-238, 239-240. It was to these "two situations" that the Senate Report referred. However, the conference agreement limited the permissible enforcement of a union security agreement to the payment of dues only.

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> Mr. TAFT. * * * The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.
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> * * * * *
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> Mr. PEPPER. And the union can admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept.
>
> Mr. BALL. That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him.

In sum, the statutory scheme clearly establishes, and its legislative history conclusively confirms, that a labor organization is divested of all control over employment for the purpose of either advancing or retarding an employee's exercise of his right to participate in or to forego union activity, with a single narrow exception. That narrow exception permits a union through a valid union security agreement to compel payment of union dues. This aside, the power of a union to discriminate in employment has been annulled by the Act. *Union Starch & Refining Co.* v. *National Labor Relations Board*, 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815 (compulsion under a union security

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agreement to take an oath of allegiance to the union); *National Labor Relations Board* v. *Electric Auto-Lite Co.*, 196 F. 2d 500 (C. A. 6), enforcing 92 NLRB 1073 (compulsion under a union security agreement to attend union meetings); *National Labor Relations Board* v. *Eclipse Lumber Co.*, 31 LRRM 2065, 2066-67 (C. A. 9, November 12, 1952) (compulsion under a union security agreement to pay special assessments and fines).

C. WITHOUT A VALID UNION SECURITY AGREEMENT, REDUCTION IN AN EMPLOYEE'S SENIORITY FOR DUES DELINQUENCY IS DISCRIMINATION WHICH ENCOURAGES "MEMBERSHIP" WITHIN THE MEANING OF SECTION 8(a)(3)

In the teeth of the Act's guarantee that no payment of union dues shall be compelled except through a valid union security agreement, the court below holds that an employee's seniority may be reduced for delinquency in paying dues without the sanction of a valid union security agreement. This result is so at odds with Congress' manifest objective that were it the only consequence of the court's interpretation, it would be enough to invalidate its reasoning. But the court's decision undercuts the statutory scheme even more seriously. If the sanction of a valid union security agreement is not indispensable to compelling dues payment, there is no reason, at least insofar as the prohibition of Section 8 (a) (3) and (b) (2) is concerned, why dues payments may not be exacted by an employer-assisted union which does not represent a majority

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of the employees and is without statutory authorization to negotiate a union security agreement; for the statutory preconditions to a union's eligibility to negotiate a union security agreement are inoperative safeguards if dues payment can be compelled without agreement. Furthermore, on the precise reasoning followed by the court below in this case, there is no reason why an employee's seniority may not be reduced for refusal to buy a ticket for a raffle supported by the union, for testifying against a union shop steward, or for running for office against an incumbent union official. Yet these are the very practices which Congress denounced (*supra,* pp. 19-20) and which the statutory scheme it formulated was designed to preclude.

An interpretation of the Act so inconsistent with its demonstrable purpose cannot be sound. It rests on the court's basic misconception that "membership in any labor organization," which Section 8 (a) (3) states shall not be encouraged or discouraged by discrimination, refers only to the enrollment of an employee in a union. On this view, the effect of discrimination is relevant only as it induces an employee to join or withdraw from a union. Hence, according to the court in this case, since employee Boston was always a member of the Union, and was not induced either to retain or discontinue his membership, the reduction in his seniority for dues delinquency was an immaterial discrimination. But, as we now show, "membership in any labor organization" embraces the status of membership *in good standing,* of which payment

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of dues is an indispensable attribute; reduction in an employee's seniority for dues delinquency is obviously and necessarily designed to encourage his membership in good standing and is, therefore, squarely within the Act's condemnation.

1. *Membership embraces membership in good standing, which is plainly encouraged by discrimination for dues delinquency*

Membership in a labor organization in trade union usage embraces membership in good standing. Good standing is based on the faithful performance of membership obligations. A member who defaults in the performance of his union obligations subjects himself to the risk that the union will deprive him of his good-standing status. Keeping current in the payment of union dues is the most common requirement of membership in good standing, and delinquency in dues payment is the garden variety reason for loss of good standing. In this case, for example, the Union's by-laws expressly specify that "To be in continuous good standing, a member must pay his dues on or before the first of the month, in advance" (R. 65).

Union security agreements incorporate this concept of union membership. Such agreements are customarily phrased in terms of requiring membership in good standing.[19] In this case, for ex-

[19] For typical Wagner Act Agreements incorporating this meaning, see *Colgate-Palmolive-Peet Co.* v. *National Labor Relations Board*, 338 U. S. 355, 357-358; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 688-689.

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ample, although the union security agreement was inoperative because of the lack of statutory authorization on which its effectuation depended (*supra*, pp. 3-4), it was worded as a requirement that employees "shall be members of the union in good standing as a condition of continued employment" (R. 38).[20]

It was on this common understanding of the meaning of membership that the National War Labor Board acted during World War II. In compromising the claim of organized labor that it should be awarded the closed or union shop in exchange for relinquishing the right to strike, the War Labor Board granted labor organizations a provision guaranteeing maintenance of membership. *Federal Shipbuilding and Drydock Company*, 1 War. Lab. Rep. 140. It required that an employee already a union member was "to maintain his membership in the Union *in good standing*" during the life of the agreement (*id.*, at 141; emphasis supplied). The War Labor Board defined good standing, recognizing that it would be lost and that the employee would risk discharge unless he agreed to pay his financial obligations to the union, to mean that (*ibid.*):

> In order to maintain good standing in the Union * * * an employee shall be required to pay only the regular monthly dues or fines

[20] The same is true of the agreement in *Radio Officers' Union of the Commercial Telegraphers Union* v. *National Labor Relations Board*, No. 230, this Term, which is the companion case to this one.

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> and comply with any other penalties that may be imposed upon him by the Union for specific acts involving the violation of any of the terms and conditions of this agreement, or *violation of any of the terms or conditions of the constitution or by-laws of the Union.* [Emphasis supplied.]

Thus the maintenance of membership agreement required "members to abide by the *obligation as to union membership* and check-off which they individually and voluntarily assume." *Bethlehem Steel Corp.*, 1 War Lab. Rep. 325, 331 (emphasis supplied).

In forbidding discrimination to encourage or discourage "membership in any labor organization," Section 8 (3) of the Wagner Act was based on this common understanding that "membership" embraces maintaining good standing status.[21] It was uniformly recognized that, pursuant to a valid union security agreement, discrimination against an employee was justified because of his loss of membership in good standing, and the inquiry was directed to whether the discrimination was sanctioned by a valid agreement.[22] Conversely, if an

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[21] "Collective bargaining * * * generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346, quoted in *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 408.

[22] *E.g.*, *Premo Pharmaceutical Laboratories, Inc.*, 42 NLRB 1086, 1098-1099, enforced, 136 F. 2d 85 (C. A. 2); *Tappan Stove Co.*, 66 NLRB 759, 783, enforced, 174 F. 2d 1007, 1012 (C. A. 6); *John Engelhorn & Sons*, 42 NLRB 866, 879, enforced, 134 F. 2d 553, 558 (C. A. 3).

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employee defaulted in the performance of a membership obligation, but the union did not translate this default into at least loss of good-standing membership, a valid union security agreement could not be invoked to justify any discrimination against the employee for failure to maintain his good standing.[23] Furthermore, it was never doubted that a valid union security agreement could be properly invoked to cause the discharge of an employee *suspended* from membership, despite his retention of his status as a member on the union's rolls, and that it was unnecessary totally to sever the employee's membership in a union through expulsion.[24] This followed *a fortiori* from the fact that loss of membership in good standing was alone enough to justify the discharge. In short, inquiry did not stop with determining whether an employee joined, remained in, or withdrew from a union as a result of discrimination; there remained the question of the effect of the discrimination on maintaining membership in good standing.[25]

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[23] *Ansley Radio Corp.*, 18 NLRB 1028, 1042-43; *National Labor Relations Board* v. *Federal Engineering Co.*, 153 F. 2d 233, 235 (C. A. 6), enforcing 60 NLRB 592, 593.

[24] *E.g.*, *Colgate-Palmolive-Peet Co.*, 70 NLRB 1202, enforced, 171 F. 2d 956 (C. A. 9), reversed, 338 U. S. 355 (some employees suspended, others expelled, but all properly discharged pursuant to an agreement requiring membership in good standing).

[25] That membership as used in Section 8(3) of the original Act was not limited to the passive status of membership divorced from its attributes is strikingly illustrated by *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 49 (C. A. 9), enforcing 48 NLRB 892, 894. In that case, to

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Not only was it clear that Section 8 (3) of the original Act contemplated membership in good standing; it was also clear that, without a valid union security agreement, to compel the payment of union dues was in violation of this subsection. For to compel a member to pay union dues obviously encouraged his membership in good standing; and to compel a non-member to pay union dues encouraged him to join, because if he was required in any event to contribute to a union's financial well-being, he had a powerful incentive to participate in its affairs as well. Hence, from the beginning of the Wagner Act's administration, when interpretation had the freshness of contemporaneous understanding, Section 8 (3) was construed to forbid requiring the payment of union dues in the absence of a valid union security agreement. *National Electric Products Corp.*, 3 NLRB 475, 486 and n. 11. As forcefully put in *Sperry Gyroscope Co., Inc.* v. *National Labor Relations Board*, 129 F. 2d 922, 930-931 (C. A. 2), enforcing 36 NLRB 1349, 1367: [26]

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defend its discrimination against employees for engaging in union activity, the employer maintained that no employee had been dissuaded from remaining in the union. Rejecting that defense, the Ninth Circuit observed that "All employees might deem it wise to forego all active part in union affairs thereby in effect relinquishing their right to membership in a labor union." The Court thus assimilated "membership in a labor union" to taking an "active part in union affairs" and held that to discourage one was to discourage the other.

[26] See also, *Tappan Stove Co.*, 66 NLRB 759, 783, enforced, 174 F. 2d 1007, 1012 (C. A. 6); *National Labor Relations Board* v. *John Engelhorn & Sons*, 134 F. 2d 553, 558 (C. A. 3), enforcing 42 NLRB 866.

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> Discharge of an employee because he has failed to pay dues to a union is the clearest sort of violation of Section 8 (3) of the Act, so much so that a proviso had to be included in Section 8 (3) to authorize closed shop agreements; such a discharge can only be justified if it comes within that proviso.

And this conclusion is in keeping with the explanation in the Senate Report accompanying the Wagner Act which pointed out that Section 8 (3) "rounds out the idea expressed in section 7 (a) of the National Industrial Recovery Act to the effect that—'No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or *assisting* a labor organization of his own choosing * * *.'" S. Rep. No. 573, 74th Cong., 1st Sess., 11 (emphasis supplied). To pay dues to a union palpably assists it, and Section 8 (3) safeguards an employee against "assisting a labor organization" against his will.

This was the situation which prevailed under the original Act. Membership as used in Section 8 (3) embraced membership in good standing; and Section 8 (3) prohibited the compulsory payment of union dues except through a valid union security agreement. Plainly the Congress which enacted the amendments to the Act intended no departure from either view. As the Board has explained concerning the meaning of membership

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(*Firestone Tire and Rubber Co.*, 93 NLRB 981, 983):[27]

> * * * Congress intended by the word "membership" to permit a requirement of *membership in good standing.* The proviso to the original Wagner Act was couched, insofar as here relevant, in precisely the same terms as is the proviso to the amended Act. It permitted an agreement to require as a condition of employment "membership" in a union. The word "membership" in that proviso was consistently construed in Wagner Act cases, in accordance with established contractual practice in the field of labor relations [footnote omitted], as sanctioning contracts requiring membership "in good standing." * * * The amended Act, with its amended provisos, does not change the type of membership permitted to be made a condition of employment, although it permits a discharge for loss of "membership" *only* when such membership is lost for failure to tender periodic dues or initiation fees. Thus, the substantial alterations made by the amendments limit the *grounds* on which good-standing membership must be lost in order to legalize discrimination, but do not change the *kind* of membership that

[27] The *Firestone* case is the exact analogue to the instant case. It involves the same union, represented by the same counsel, indulging in the same practice of reducing an employee's seniority for delinquency in dues payment. The crucial difference is that in *Firestone* the discrimination practiced had the sanction of a valid union security agreement and was therefore privileged. In this case, the Union seeks to accomplish without a valid agreement the same discrimination which *Firestone* justified only because of the existence of the agreement.

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> must be lost [footnote omitted]. Congress, when it repeated the precise phraseology of the original Act in this respect, was apparently satisfied with the Board's consistent construction of the original proviso as permitting a requirement of membership *in good standing.*

No inference is necessary to show Congressional awareness of this meaning of the term "membership." In describing the data which a union must furnish to the Secretary of Labor in order to be eligible to invoke the Board's processes, and the filing of which is a condition precedent to a union's authority to effectuate a union security agreement (*supra,* p. 15 and n. 4), Congress called for a report on "the regular dues or fees which members are required to pay in order to remain members *in good standing* of such labor organization." (Section 9 (f) (5) of the Act; emphasis supplied.)

To interpret membership as embracing membership in good standing is the "natural construction which the text, the legislative setting and the function of the statute command * * *."[28] It fulfills the manifest purpose of Congress to illegalize compulsory dues payment by union members except through a valid union security agreement. In this case, employee Boston was delinquent in his payment of dues, and according to the Union's by-laws, a member must keep current in his dues payment "To be in continuous good standing" (R.

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[28] *Phelps-Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 186.

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65). For his delinquency he was penalized by a reduction in his seniority. This palpably encouraged him to maintain his membership in good standing. But since the discrimination against him was without the sanction of a valid union security agreement, it violated Section 8 (b) (2) of the Act.

2. *Membership, even in the restricted sense of enrollment in the union, is encouraged by discrimination for dues delinquency*

Even if membership is restricted to enrollment in a union, the court below fails adequately to evaluate the influence on enlisting and maintaining membership which is exerted by compulsory dues payment.

Compulsory dues payment assures the union a steady and predictable flow of revenue. Guaranteed funds enable the union to confer better services both upon its members and upon the employees it represents. Improved services enhance the attractiveness of the union, and tend therefore to influence present members to remain in the union and non-members to join.

In addition, the compulsory enforcement of dues collection through control over the job has independent significance. The capacity of a union to impair an employee's tenure of employment forcefully demonstrates its power. It illustrates its potency as an "organization whose assistance is to be sought and whose opposition is to be avoided" (R. 26). In evaluating the use of "economic power

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* * * over other men and their jobs to influence their action,"[29] it cannot be overlooked that "slight suggestions" may have "telling effect among men who know the consequences of incurring the * * * strong displeasure" of those who control employment.[30] Therefore, to those employees who in earning a living must reckon with a union exercising control over employment to compel adherence to its rules, it may well seem discreet to join or remain in the union without the appearance of dissidence.

Hence, discrimination to compel dues payment has a cognizable effect on encouraging joining and remaining in a union.

3. *Discrimination is outlawed if it tends to encourage or discourage union membership and reduction in seniority for dues delinquency has an encouraging tendency*

Under either view of the meaning of membership—whether it is restricted to enrollment or embraces good standing status as well—"under section 8 (3) any discrimination is outlawed which *tends* to 'encourage or discourage membership in any labor organization.'" H. Rep. No. 1147, 74th Cong., 1st Sess., 21 (emphasis supplied). It is necessary only reasonably to infer that the discrim-

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[29] *Giboney* v. *Empire Storage and Ice Co.*, 336 U. S. 490, 503, n. 6, quoting Mr. Justice Douglas in *Thomas* v. *Collins*, 323 U. S. 516, 543.

[30] *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 78, 80.

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ination "was of such a character as to have a *natural tendency*" to induce or dissuade from membership. *General Motors Corp.,* 59 NLRB 1143, 1145, enforced with immaterial modification, 150 F. 2d 201 (C. A. 3) (emphasis supplied). Accord: *National Labor Relations Board* v. *Gaynor News Co.,* 197 F. 2d 719, 722-723 (C. A. 2), certiorari pending, No. 371, this Term; *National Labor Relations Board* v. *Walt Disney Productions,* 146 F. 2d 44, 49 (C. A. 9); *National Labor Relations Board* v. *J. G. Boswell & Co.,* 136 F. 2d 585, 595-596 (C. A. 9); *National Labor Relations Board* v. *Brezner Tanning Co.,* 141 F. 2d 62 (C. A. 1); *National Labor Relations Board* v. *Vail Mfg. Co.,* 158 F. 2d 664, 666-667 (C. A. 7), certiorari denied, 331 U. S. 835; *National Labor Relations Board* v. *Cities Service Oil Co.,* 129 F. 2d 933, 937 (C. A. 2).

In this case, the requisite tendency to affect membership inheres in the discrimination practiced. Reduction in an employee's seniority for dues delinquency irrefutably tends to encourage his membership in good standing. That is its reason and its inescapable effect. And as it relates to the narrower meaning of membership, the discrimination, as we have shown (*supra,* pp. 36-37), tends to encourage the acquisition and retention of membership. It is immaterial that the "union-encouraging effect of discriminatory treatment is not felt immediately;" it is enough if "there is a reasonable likelihood the effects may be felt years later * * *." *National Labor Relations Board*

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v. *Gaynor News Co., Inc.*, 197 F. 2d 719, 723 (C. A. 2), certiorari pending No. 371, this Term.

The court below holds, however, that it is not enough reasonably to infer the consequences from the character of the discrimination; independent evidence must be introduced to establish an actual manifestation of the forbidden effect (R. 93-95).[31] But as this Court has held, in rejecting a contention that "there must be evidence * * * to show that [conduct] * * * interfered with and discouraged union organization," the requirement of proof necessitates only "the production of evidential facts;" it does not "compel evidence as to the results which may flow from such facts." *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 798, 800. The Board "may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven," and the inference drawn carries the authority of a conclusion "made by experienced officials with an adequate appreciation of the complexities of the subject entrusted to their administration" (*ibid.*, at p. 800).[32] In

[31] We assume that if the court had understood membership to embrace good standing, it would have been satisfied that the evidence of discrimination sufficiently establishes encouragement of membership in good standing even on its own test. Its view of the inadequacy of the evidence in this case relates only to its narrow conception of the meaning of membership.

[32] The amended Act does not "negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 488.

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this case the "evidential facts" were established,—reduction in seniority for dues delinquency—and the inference the Board drew, that an unlawful tendency to encourage membership had been shown, was "reasonably * * * based upon the facts proven * * *."

If independent evidence must be adduced to establish the proscribed tendency, this can ordinarily be done only by taking testimony from the employees concerning their reaction to the discrimination practiced. But "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588. If nothing else, "a feeling by employees 'that they were under no sense of constraint * * * is a subtle thing, and the recognition of constraint may call for a high degree of introspective perception.'" *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 231, quoting from *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. 2d 930, 937 (C. A. 1). Hence, the conclusion concerning the effect of proscribed conduct "must of necessity be based on the existence of conditions or circumstances * * * as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 588. This is the test in determining whether, in violation

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of Section 8 (a)(1) of the Act, conduct tends "to interfere with, restrain, or coerce" employees in the exercise of their guaranteed rights. We discern no reason for applying a different test in determining whether discrimination tends "to encourage or discourage" membership. And by that test it does not matter whether the conduct proscribed results in an employee's actually feeling constrained; it matters only that the conduct can be reasonably said to have that tendency. *Western Cartridge Co.* v. *National Labor Relations Board,* 134 F. 2d 240, 244-245 (C. A. 7), certiorari denied, 320 U.S. 746; *National Labor Relations Board* v. *Ford Bros.,* 170 F. 2d 735, 738 (C. A. 6); *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 743-744 (C. A. D. C.), certiorari denied, 341 U. S. 914; *National Labor Relations Board* v. *Brezner Tanning Co.,* 141 F. 2d 62, 64 (C. A. 1); *National Labor Relations Board* v. *John Engelhorn,* 134 F. 2d 553, 557 (C. A. 3); *National Labor Relations Board* v. *A. S. Abell Co.,* 97 F. 2d 951, 955-956 (C. A. 4); *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 113 F. 2d 85, 92 (C. A. 5); *National Labor Relations Board* v. *Illinois Tool Works,* 153 F. 2d 811, 814 (C. A. 7); *Elastic Stop Nut Co.* v. *National Labor Relations Board,* 142 F. 2d 371, 377 (C. A. 8), certiorari denied, 323 U. S. 722.

Furthermore, if the reaction actually manifested by the employees to the discrimination is what is pertinent, and not the tendency of the discrimination to evoke the reaction whether or not it mate-

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rialized, then the outlawry of discrimination depends on the unacceptable test whether it "succeeded or failed."[33] *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7); see also, *National Labor Relations Board* v. *John Engelhorn & Sons*, 134 F. 2d 553, 557 (C. A. 3). Discrimination would or would not be proscribed depending on the hardihood, timidity, or indifference of the employees against whom it was directed. According to their temperaments, discrimination may stiffen the resolve of some employees to maintain their position, it may enfeeble the determination of others, and still others may be unaware whether the impact of the discrimination on them has been innocuous or telling. After ascertaining the diverse reactions, presumably, under the test of the court below, the net effect would have to be calculated, and, based on the result, the discrimination would or would not be held to constitute a violation. On this approach, a simple and uniform standard by which to ascertain whether particular acts constitute proscribed

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[33] We are not driving the court's reasoning to an extreme it has not already accepted. In *Modern Motors, Inc.* v. *National Labor Relations Board*, 198 F. 2d 925, 926 (C. A. 8), while holding that discriminatory discharges by an employer violated Section 8(a)(1) of the Act, the court refused to hold that they also violated Section 8(a)(3). The court reasoned that whatever might be "the right of the Board to evaluate in an equivocal situation the tendency of such action generally," such an "abstract inference" cannot prevail in the face of "specific, unequivocal, demonstrative proof of actual contrary result." The "actual contrary result" was that the discriminatory discharges "directly stimulated union interest and affiliation" and "under these conditions could hardly realistically be appraised as 'discouraging membership in a labor organization.' "

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discrimination can never be developed, for whether or not discrimination was to be found would vary with the different reactions the same conduct might evoke in different cases.

It seems clear that to look to the actual reaction of the employees is to go off on an unworkable and irrelevant tangent. Actual reaction is relevant only to the success or failure of the discrimination practiced. There is no warrant for assuming that the Act is indifferent to its unsuccessful breach. Discrimination is forbidden by Section 8 (a) (3) and 8 (b) (2) if it has a tendency to encourage or discourage union membership; the existence of the tendency may reasonably be inferred from the character of the discrimination. In this case the reduction in seniority for dues delinquency meets these standards.

D. A UNION, BY CAUSING REDUCTION IN AN EMPLOYEE'S SENIORITY FOR DUES DELINQUENCY, IS GUILTY OF RESTRAINT AND COERCION OF THE EMPLOYEE IN EXERCISING HIS RIGHT TO REFRAIN FROM ASSISTING A UNION WITHIN THE MEANING OF SECTION 8 (b) (1) (A) OF THE ACT

In its decision, the court below failed to consider the Board's conclusion that, independently of its violation of Section 8 (b) (2) of the Act, the Union violated Section 8 (b) (1) (A) of the Act.

Section 8 (b) (1) (A) forbids a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7 * * *."

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Section 7 states that employees shall have the right to "assist labor organizations," but that they shall also have the right to "refrain" from this activity, except to the extent that its exercise may be abridged by a valid union security agreement. Since no such valid agreement exists in this case, the right of the employees involved to refrain from assisting a labor organization is unlimited.

To pay union dues is plainly to assist a labor organization; conversely, to be delinquent in payment is clearly to refrain from assisting a union. That abstention is safeguarded by the Act against restraint or coercion.

In this case, employee Boston was delinquent in his dues payment, and for this reason his seniority was reduced by the Union. To impair a worker's tenure of employment is to restrain or coerce him, for there is little to which an employee is more sensitive than diminution of his earning capacity. The Union's conduct, therefore, falls within the ban of the plain meaning of Section 8 (b) (1) (A).[34]

[34] However, if the Union's conduct falls only within the prohibition of Section 8(b)(1)(A), part 1(a) and (b) of the Board's order (R. 16) would appear to require refashioning insofar as those provisions of the order are addressed to a violation of Section 8(b)(2).

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CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed and the case remanded with directions to enter a decree enforcing the Board's order.

WALTER J. CUMMINGS, JR.,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

BERNARD DUNAU,
ELIZABETH W. WESTON,
LOUIS SCHWARTZ,
Attorneys,

National Labor Relations Board.

DECEMBER, 1952.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, and 65 Stat. 601, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making

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an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made [; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:*[35] *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to

[35] Provisions which were eliminated by 65 Stat. 601 are enclosed in brackets; provisions which were added by that amendment are in italics.

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other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

* * * * *

(e) [(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition

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alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) * * *]

1) *Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.*

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

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(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion

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that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein,

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and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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